

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN,
ELVIRA BUMPUS, RONALD BIENDSEI,
LESLIE W. DAVIS, III, BRETT ECKSTEIN,
GEORGIA ROGERS, RICHARD
KRESBACH, ROCHELLE MOORE, AMY
RISSEEUW, JUDY ROBSON, JEANNE
SANCHEZ-BELL, CECELIA SCHLIEPP,
TRAVIS THYSSEN and CINDY BARBERA,

Case No. 11-C-562
JPS-DPW-RMD

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE
MOORE, and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government
Accountability Board, each only in his official
capacity: MICHAEL BRENNAN,
DAVID DEININGER, GERALD NICHOL,
THOMAS CANE, THOMAS BARLAND,
TIMOTHY VOCKE, and KEVIN KENNEDY,
Director and General Counsel for the Wisconsin
Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR.,
THOMAS E. PETRI, PAUL D. RYAN, JR.,
REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants

VOCES DE LA FRONTERA, INC., RAMIRO
VARA, OLGA VARA, JOSE PEREZ, and
ERICA RAMIREZ,

Plaintiffs,

v.

Members of the Wisconsin Government
Accountability Board, each only in his official
capacity: MICHAEL BRENNAN, DAVID
DEININGER, GERALD NICHOL, THOMAS
CANE, THOMAS BARLAND, TIMOTHY
VOCKE, and KEVIN KENNEDY, Director and
General Counsel for the Wisconsin Government
Accountability Board,

Case No. 11-CV-1011
JPS-DPW-RMD

Defendants.

DEFENDANTS' MOTION IN LIMINE

After the deadline passed for raising questions about alleged “anomalies” in the census data, the plaintiffs announced they would call Kevin Kennedy to testify about that very thing. And they timed this announcement to come after the deadline had also passed for filing motions in limine. However, because plaintiffs plan to have Mr. Kennedy testify about irrelevant census matters, and because it is now too late for defendants to assemble a response to these issues, it became necessary to file this motion. Defendants request that none of the plaintiffs be allowed to call Mr. Kennedy or any other witness for the purpose of testifying about alleged census “anomalies” or “discrepancies.”¹

¹ The only claim plaintiffs have alleged about which Mr. Kennedy could offer relevant testimony is count 9, plaintiffs' claim seeking a declaration that any special or recall elections cannot be conducted under Act 43. As an initial matter, defendants have not and are not taking a contrary position in this lawsuit, leaving plaintiffs without a case or controversy and this Court without jurisdiction. *United States v. Juvenile Male*, 564 U.S. ___, 131 S.Ct. 2860, 2864 (Jun. 27, 2011) (Article III requires case or controversy throughout lawsuit); *MedImmune Inc. v. Genentech Inc.*, 549 U.S. 118 (2007) (federal court may not enter declaratory judgment when parties before it do not present adverse legal interests). Moreover, even if there were a dispute between plaintiffs and defendants on this issue that might otherwise give rise to a case or controversy, this Court would still lack jurisdiction as “a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when-as here-the relief sought...has an impact directly on the State itself.” *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984). This sovereign immunity bar extends to claims for declaratory relief. See, e.g., *Benning v. Bd. of Regents of Regency Universities*, 928 F.2d 775, 778 (7th Cir. 1991).

Introduction

The plaintiffs have already admitted that the alleged census “anomalies” to which they want Mr. Kennedy to testify do not affect the constitutionality of 2011 Wisconsin Acts 43 or 44. Nonetheless, in a four-day trial involving five parties, the sole purpose of which is to determine the Acts’ constitutionality, the plaintiffs want to spend the limited amount of time available talking about what they admit is irrelevant to the case. Because of the amount of material that must be presented in such a limited amount of time, and the number of parties involved, it is imperative that trial testimony be limited to those witnesses with *relevant* information.

The plaintiffs, had they wished, could have made the census “anomalies” relevant to this case: They were given until February 10, 2012, to amend their complaint (again) if they found anything about those “anomalies” that could affect the constitutionality of Acts 43 and 44. Similarly, they were given additional time to amend their expert report (or seek a new one) to address their concerns. They did neither. So none of the current pleadings claim that 2011 Acts 43 and 44 are unsound because of errors in the census.

Procedural History

On the last day to issue written discovery, January 12, 2012, plaintiffs served additional interrogatories and document requests to defendants related to news reports of supposed census errors and “anomalies” discovered by or reported to the GAB during their work with county and municipal clerks. That information was not relevant to plaintiffs’ claims; nonetheless, defendants agreed to make the information available, and produce witnesses for deposition. They further agreed to allow plaintiffs to amend their complaint to add a claim about the alleged census issues, and seek expert testimony in support of the new claim. The Court embodied this

agreement in an order entered on January 24, 2012. (Docket # 125). Although defendants produced the requested information, and the plaintiffs deposed three witnesses on this topic (Kevin Kennedy, Tony Van Der Wielen, and David Meyer), the plaintiffs chose not to amend their complaint or seek a new expert report. And the deadline for doing so has now passed.

Plaintiffs Admit the Evidence is Not Relevant

Yet, on February 14, 2012, the date the joint pretrial report was due to this Court, and only after pressed by defendants, plaintiffs revealed that they intend to call Mr. Kennedy to testify to census anomalies and inaccuracies, even though they agreed those issues were not relevant to the claims that Acts 43 and 44 are invalid. When asked to explain why plaintiffs would use trial time to present live testimony of Mr. Kennedy when any testimony on census "anomalies" or errors could not possibly support any of plaintiffs' claims, plaintiffs' counsel stated: "We do not intend to challenge the accuracy of the census data itself. . . . [A]lthough we do not intend to argue that the 'anomalies' issue caused legislative or congressional districts to become unconstitutionally unbalanced or caused voters to move districts, I do intend to elicit testimony that the 'anomalies' or 'discrepancies' were the result of a rushed process, and that it has caused confusion and uncertainty for municipal clerks and voters."² When further pressed, plaintiffs' counsel further stated that "the topic is relevant to remedies should the Court remand the maps to the legislature."³

But the process by which Acts 43 and 44 came into being is no part of this case, nor is any confusion or uncertainty with respect to implementing Acts 43 or 44. The information could not even be useful for the purpose of discussing remedies, because the Court has already said remedies will not be addressed in this trial. (Docket #35, Topic 5 "Trial", at p. 4.)

² Declaration of Daniel Kelly ¶ 4, Ex. A ("Kelly Dec.").

³ *Id.* at ¶ 5.

Furthermore, if plaintiffs are able to proceed with Mr. Kennedy as a witness at trial, defendants would be prejudiced in their ability to respond to the testimony elicited. Defendants have not asked for their experts or lay witnesses to evaluate and/or opine on the census "anomalies", they did not consider proposing stipulated or contested statements of fact, they did not designate trial exhibits or deposition designations that could respond and they have no meaningful way to address it in their trial brief or at trial. Defendants relied on the passage of plaintiffs' February 10 deadline in making those strategic decisions.

There is no justification for using trial time to present trial testimony on census "anomalies" when it is irrelevant to the validity of the redistricting legislation. Under Federal Rules of Evidence 401 and 402, testimony on this topic is inadmissible because it has *no* tendency to make the existence of any fact of consequence more or less probable. As it has no capacity to advance the inquiry into the validity of the statutes at issue, it is a waste of time and would otherwise prejudice defendants as they have no meaningful way to respond. Under Rules 401-403 and this Court's previous orders, testimony on census "anomalies" should be excluded from trial.

Conclusion

For the reasons stated above, the Government Accountability Board asks this Court to issue an order to prevent plaintiffs from eliciting trial testimony of any witness, including Board Director and General Counsel Kevin Kennedy, about census anomalies or other evidence related to the implementation of Acts 43 or 44.

Dated this 15th day of February, 2012.

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